generic requirements by large carriers, other entities, or alliances."[57] As the Commission seems to recognize, applying Section 273 to regulate these activities is beyond the scope of the Section. The statute's procedures apply only when standard-setting entities "establish and publish" standards, not when they research or develop them. Attempting to begin regulating telecommunications research and development activities through Section 273(d)(4) because those activities might someday result in a published standard would obstruct research and slow innovation. It would handicap market-driven informal efforts to develop new solutions as notices are published and the statutory consensus reached. It would threaten incentives to innovate by forcing public disclosure and delay, making it harder to reap the benefits of innovation. Similarly, individual company decisions to use standards, or parts of standards, when they purchase equipment are beyond the statute's "establish and publish" requirement.[58]

The Commission also seeks a definition of the word "standard."[59] The *Notice* proposes no definition, indicating that defining the word is no easy matter and reflecting that there is no generally accepted definition of "standard" within the industry.[60] Indeed, the word "standard" is little used by today's "standard-setting" bodies. Generally, the major bodies use the word "recommendation" when they define solutions. These "recommendations" are just that, and are

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[57] Notice at ¶ 50. There is no statutory basis for including "specifications" as used in this quotation as even being potentially within the scope of Section 273(d)(4).

[58] Individual companies are unlikely to be standard setting entities, either.

[59] *Notice* at 34.

[60] The term "generic requirement" is equally difficult to define. Generally, a generic requirement is a formal description of the attributes of a system or system element at a level of detail necessary to specify the externally observed behavior of the system, but which is independent of the specific design for implementation or development of the system or system element. Attempting to broadly apply open procedures based on this definition creates the same dangers as in the case of "standards."

not mandatory. In fact, they generally do not even define a single internal approach to a solution, but provide users with options. The statute's use of the words "establish and publish" suggests that it is concerned with formal efforts to define mandatory solutions. Publication of mandatory standards for the industry could raise concerns that might be best addressed through the statute's public notice and consensus building requirements. Applying the statute's requirements to these sorts of formal mandatory requirements could serve a useful purpose. Expanding the definition of "standard" to attempt to reach less formal, voluntary consensus building efforts around particular technological solutions would be disastrous for the telecommunications industry and the industries that market to it. As discussed above, the expansion of the definition of "standard" would slow the pace of innovation while statutory mandates for notice and consensus are reached.

The asserted basis for the Commission's concern over the standards setting process is that it "may present opportunities for anticompetitive conduct."[61] Other than citing to selected economic writings that discuss standard setting and network competition, however, the *Notice* provides no analysis of the likelihood for potential anticompetitive misuse of the standard setting process or whether more "open" procedures would reduce that likelihood. In fact, the authors of one of the economic articles referenced in the *Notice*[62] explicitly conclude that intervention in the standard setting process is simply not desirable: "We are far from having a general theory of when

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[61] *Notice* at ¶ 31. Indeed, the direction of the *Notice* seems to center on the concern that, at some undefined future point, BOCs may have manufacturing affiliates and may act improperly to favor those affiliates. Generally, however, manufacturer participation in "standard" setting is the rule, notwithstanding that manufacturers all have some incentive to influence standards in a way favorable to themselves. Despite these incentives for self-favoritism, "standard" setting bodies have concluded that participation by manufacturers or their affiliates is valuable and any improper motivation can be remedied through private means.

[62] *Notice* at ¶ 31, n. 51.

government intervention is preferable to the unregulated market outcome."[63] The other cited studies similarly provide no framework or support for Commission intervention in private standard setting.

Moreover, the antitrust laws do have a well-developed framework that subjects private parties that misuse the standard setting activities to harm competition to treble damages.[64] Years of antitrust enforcement and analysis have led to the recognition that the great majority of standard setting activities are procompetitive and provide very substantial benefits to consumers.[65] Commentators also recognize these benefits: "The advantages to society associated with the widespread adoption of common standards can be very large, as network externalities are often considerable. It is, therefore, critical that antitrust law and litigation do not stand in the way of such activities."[66]

Because the antitrust laws prohibit the use of standard setting to harm competition, additional Commission regulation is unlikely to provide any further benefit. Certainly, attempting to force open procedures on the market simply because a few BOCs contribute to funding a standard setting effort where they have few votes out of hundreds makes little sense. Absent a clear theory of potential benefits from Commission intervention in this area, forcing every group that includes three or more BOCs and which is considering technical solutions that may be used in telecommunications to issue public invitations to participate, publish drafts of "standards," and

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[63] Katz, Michael L. and Carl Shapiro, *Systems Competition and Network Effects*; J. of Economic Perspectives, Spring 1994, 93, 113.

[64] *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

[65] *Id.*, at 501.

[66] Teece, *Information Sharing and Innovation*, 62 Antitrust Law Journal 475 (1994).

achieve consensus would slow and obstruct the development of innovative solutions to telecommunications needs.

Indeed, as one commenter has explained, the standards process is already complex, cumbersome, and potentially irrelevant when technology is developing at a pace with which the standards process cannot keep up:

> When technology is changing rapidly, standard-setting activities may get bypassed because cooperative efforts may simply be too slow. When events become too technically complex and fluid, a focal point is easily lost. This problem is already arising in telecommunications as private networks proliferate. Reaching agreement on an Integrated Services Digital Network (ISDN), for instance, is complicated if once ISDN standards are written, the nature of technology has changed so that the standard is no longer ideal from a technical standpoint. Standards do not serve as a guide to component designers if the standards organizations is overwhelmed by technical changes and must frequently amend its standards.[67]

The Commission should avoid imposing requirements that would introduce even further potential delay into the standards process.

Consumers and producers will be best served if the Commission adheres to the language of the statute and refrains from issuing regulations that seek to broaden its scope. Limiting the public notice and consensus requirements of Section 273 to mandatory industry requirements established and published by non-accredited bodies could serve a useful purpose. Expanding it will not create any new benefits, because the antitrust laws have adequately governed standard setting activities by prohibiting their use to anticompetitive effect for years. Allowing the market to work here, as it has been successfully doing, would save telecommunications consumers and

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[67] *Id.* at 477.

firms the substantial costs of injecting a new and unnecessary regulatory scheme into a fluid and rapidly changing area of standard setting and technology development for telecommunications services. This is the only rational approach until evidence supporting Commission intervention appears.

IV. BOC Equipment Procurement and Sales

Similar to its observation with respect to Section 273(c), the Commission notes that "the provisions of Section 273(e) apply on their face to all BOCs."[68] However, the heading of Section 273(e)(1) is "Nondiscrimination Standards For Manufacturing." For this reason and for those discussed in Section II, *supra*, BellSouth believes that Section 273(e)(1), like Section 273(c), applies only to a BOC that is actually engaged in manufacturing after obtaining Section 271(d) relief.

Moreover, by their very language, the nondiscrimination provisions and procurement standards of Section 273(e) apply only to a BOC, and in some instances, to "entities acting on its behalf."[69] The definition of BOC found in the Act is very precise and essentially includes only the entity offering wireline exchange service.[70] Therefore, whatever procurement standards arise from or are adopted pursuant to Section 273(e) do not apply to affiliates that do not offer wireline service. In addition, unless out-of-region wireline service is offered by an entity listed in Section 153(4)(A) or by a successor or assign of such an entity, Section 273(e) does not apply to out-of-

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[68] *Notice* at ¶ 63.

[69] 47 U.S.C. § 273(e)(1), (e)(2). Other subsections of Section 273 are similarly limited in their application. Section 273(e)(4) applies to a BOC and manufacturing affiliates, and Section 273(e)(5) applies to a BOC and an entity it owns or controls.

[70] 47 U.S.C. § 153(4); *see also*, *Notice* at n. 20.

region wireline services. This interpretation is also supported by the Commission's discussion of the perceived harms that the manufacturing restriction was designed to prevent, which focused on the exchange wireline monopoly.[71]

The Commission also seeks comment on the affirmative steps a BOC would have to take to ensure that it does "not discriminate in favor of equipment produced or supplied by an affiliate or related person."[72] Before imposing any additional regulations, the Commission should keep in mind that virtually all BOCs already have in place, in part because of the requirements of the MFJ, detailed procurement guidelines. BellSouth has been successfully using such internal guidelines for several years. More important, the concerns that led to the original imposition of the manufacturing restriction have largely disappeared with the advent, or imminent onset, of competition in virtually every telecommunications market and the demise of rate of return regulation. Previous theories based on alleged incentives to cross subsidize by buying inferior products at inflated prices no longer make any competitive or economic sense. These same facts lead to the conclusion that it is unnecessary for the Commission to adopt any additional rules or enforcement mechanisms in response to Sections 273(e)(1) and 273(e)(2).

In addition, the reach of Section 273(e)(2), because of its inclusion in a section that deals with manufacturing, is limited to equipment, services, and software that are part of manufacturing subject to Section 273(a). For example, the software subject to 273(e) can only be that which contains the "algorithms which make the hardware work."[73] This was the only software that was

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[71] *See, Notice* at ¶ 2-4.

[72] *Notice* at ¶ 66.

[73] *United States v. Western Electric Co., Inc.*, 675 F. Supp. 655, 667 n. 54 (D.D.C. 1987).

subject to the MFJ's manufacturing restriction and, because of Section 273(f), the MFJ's definition of manufacturing carries over into the Act. Clearly, the nondiscrimination and procurement standards of Section 273(e) deal only with telecommunications equipment and CPE. The procurement provisions of Sections 273(e)(1) and (2) cannot be read to extend the scope of the restrictions beyond the reach of the purpose of the section -- to deal with potential bias allegedly introduced by a BOC's entry into manufacturing -- by regulating activities that were never subjected to the manufacturing restriction of the MFJ.

V. Joint Planning

The Commission should not issue rules attempting to implement Section 273(e) joint planning provision until its completes its overlapping proceedings under Section 256.[74] Section 273(e) sets out BOCs' duties regarding joint network planning with other LECs, and requires that they be conducted consistent with the antitrust laws. Section 256 provides for Commission oversight of coordinated network planning by telecommunications carriers. Even after the Commission defines its role and procedures under Section 256, attempting to further define an overarching joint planning requirement that would be consistent with the antitrust laws may not be possible because antitrust analysis depends a great deal on the particular facts involved in joint planning and design activities that involve competitive providers. Thus, any rules would have to be flexible and account for a myriad of factual settings in order to be consistent with the antitrust laws.

The extent to which the antitrust laws permit competitors or potential competitors to engage in "joint network planning and design" depends greatly on the particular situation. The

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[74] *Notice* at ¶ 72.

antitrust laws prohibit agreements that unreasonably restrain trade and, thus, would prohibit any joint network planning that unreasonably restrains trade.[75] As long as the joint network planning is not a sham to facilitate some otherwise illegal agreement,[76] the joint planning would be analyzed under the "rule of reason."[77] To determine whether the joint activity is legal, one would examine the likely procompetitive effects of the particular joint network planning and the likely anticompetitive effects of that planning and weigh them. If the procompetitive effects predominate, the conduct is legal. This exercise is necessarily fact dependent.

As a general proposition, joint network planning and design could lead to more efficient uses of the public rights of way, and reduce the need to open streets and bury cable on a repeated basis. It could also lead to other efficient sharing of infrastructure. These are procompetitive effects. Joint network planning and design could also have anticompetitive effects. It could lessen incentives to build competing networks, or portions of networks, leading to less ubiquitous deployment of networks, and it could delay construction generally, and delay the introduction of technology and features.[78] It could also reduce cooperating firms' zeal to compete with each other (even if the firms do not explicitly agree not to compete) or it could facilitate their actual collusion.

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[75] 15 U.S.C. § 1.

[76] For example, if the planning is merely a mechanism for agreeing on where each company (or either company) will provide service, the agreement would probably viewed as a *per se* violation of the antitrust laws.

[77] *See, e.g., Business Electronics v. Sharp Electronics*, 485 U.S. 717, 723 (1988).

[78] Although Section 273(e)(3) provides that "[n]o participant in such planning shall be allowed to delay the introduction of new technology or the deployment of facilities to provide telecommunications services," forcing joint planning and design may still slow construction and deployment.

Because it is impossible to draw useful, comprehensive, bright-line distinctions between joint network planning that will or will not pass muster under the rule of reason, BellSouth suggests that no rules be adopted until completion of proceedings under Section 256 and until the industry has substantially more experience with private firm requests of BOCs to engage in joint network planning and design.

Nonetheless, BellSouth can address some of the questions posed by the *Notice*.[79] First, a Bell operating company's obligation to engage in joint network planning and design should be triggered only when another facilities-based carrier within the same area of interest makes a specific request to engage in such planning or design. Second, "area of interest" should encompass the concept that the requesting carrier actually be planning or designing its own network that either connects with or overlays the Bell operating company's network. There should be a real commitment by the requesting carrier to construct such connecting or overlaying network, and the request must relate to that network. These requirements would help ensure that the requesting carrier has a bona fide interest in using the joint planning or design to develop its own network. Third, "network planning and design" should involve only the planning and design of the physical aspects (including capabilities) of the network, and should not involve planning, or discussions of, the services that either carrier plans to provide over the network. This should help keep the joint planning and design focused on the legitimate area of the joint endeavor.

Finally, in considering rules covering joint planning and design generally, it is important to keep in mind that the Commission has no power to confer antitrust immunity on the participants in joint network planning and design. This is made clear by the statutory language in Section

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[79] *Notice* at ¶ 70-72.

273(e)(3) that states "[a] Bell operating company shall, to the extent consistent with the antitrust laws, engage in joint network planning and design." Thus, the Commission should not place the BOCs in the impossible position of having to comply with a Commission rule that could create potential treble damages liability under the antitrust laws.

CONCLUSION

For the reasons set forth above, BellSouth urges the Commission not to impose rules where none are called for by the Act, nor to impose rules that stifle BOCs' incentives to engage in product and service innovation, development, or manufacture, lest the Commission run headlong into its obligation under Section 7(a) "to encourage the provision of new technologies and services to the public."

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DATE: February 24, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of February, 1997 served the following parties to this action with a copy of the foregoing BELLSOUTH COMMENTS by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed below.

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